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Final Pretrial Conference

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 FEDERAL TRADE COMMISSION and
4 NEW YORK STATE OFFICE OF THE
ATTORNEY GENERAL,

5 Plaintiffs,

6 v.

17 CV 0124(LLS)

7 QUINCY BIOSCIENCE HOLDING CO.
8 et al.,

9 Defendants.

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10 New York, N.Y.
11 September 15, 2023
12 12:45 p.m.

13 Before:

14 HON. LOUIS L. STANTON,

15 District Judge

16 APPEARANCES

17 FEDERAL TRADE COMMISSION
Attorneys for Plaintiff
18 BY: CHRISTINE DeLORME
TIFFANY M. WOO
19 EDWARD GLENNON
ANDREW WONE

20 NEW YORK OFFICE OF THE ATTORNEY GENERAL
Attorneys for Plaintiff
21 BY: KATHRYN A. MATUSCHAK
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22 KELLEY DRYE & WARREN LLP
Attorneys for Defendant Quincy Bioscience, et al
23 BY: GEOFFREY W. CASTELLO
JACLYN M. METZINGER
24 GLENN C. GRAHAM
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25

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APPEARANCES (Continued)

COZEN O'CONNOR PC

Attorneys for Defendant Underwood

BY: MICHAEL B. de LEEUW

TAMAR WISE

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1 THE COURT: Obviously, what this meeting needs is an
2 agenda, and I'm not quite clear on what the agenda is, but it
3 seems to me that it should follow the excellent letter that I
4 got on September 13 laying out the situation in a well
5 thought-out way. And if we answer the questions in that
6 letter, understandably, there are many layers to this case.
7 But if we accomplished that much, it seems to me we've done a
8 good day's work.

9 As a background, the interplay, of course, between the
10 law and the equities and the jury questions and nonjury
11 questions don't clarify things much. But in a funny sense,
12 they isolate them in useful ways. And it seems to me that in
13 the overall, the picture is wrong, simple, if you approach it
14 in linear time.

15 It's not going to be one trial and all of these
16 questions presented at once. It's really a series of layers of
17 trial, and these problems will come sequentially. And as we
18 approach each one of them in real life -- we're following the
19 English method, which is you don't decide in advance a whole
20 lot of things that you're not aware of in full at once. When
21 you get to those, you will be just as smart as you are now, and
22 you will be much better informed. And that's the way these
23 questions will fall into order. And then taken like that, it's
24 not going to be particularly difficult, so you should not be
25 awed, but methodical.

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1 And it sounds oversimplified, but it seems to me that
2 perhaps the controlling picture is this really starts with a
3 separate trial of the state's case on its statute, 349 to 350,
4 and that goes to the jury, and it's tried to the jury with
5 consequences that later have their affects, but those should
6 not be allowed to complicate the fact that it's that trial.
7 And you have opening statements relative to that trial, and we
8 proceed. The state thinks it's seven days, and the defendants
9 15 days. Well, it will take something in that area, and when
10 we get to real life, it will take whatever it takes.

11 So these are very useful questions against that
12 concept. And if it's deeply wrong, for heaven's sake, tell me
13 now.

14 Okay. First question is a very sensible one of trial
15 structure. I think it accurately describes exactly what I've
16 just said was the proper way to view it. Underwood, of course,
17 presents a somewhat specialized problem, but I don't think it
18 should complicate the first trial. It is a fair question,
19 should Underwood be allowed to address the jury with respect to
20 the state claims, because they will later be binding as against
21 him. And I'm open, very much open, to thoughtful arguments
22 about that.

23 It sounds like a basic fairness. On the other hand,
24 there is a good deal to be said to letting the jury focus on
25 its own duty in its own case without worrying about the

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1 consequences that my follow in another setting.

2 I think I'm a little inclined towards that, but I'm
3 open to argument. The good thing is we have plenty of time.

4 I find that what I'm doing is probably not what I
5 should be doing, which is reading these and giving my own
6 action. The more common and much better procedure is I should
7 hear your desires and reactions first. So we will have that.
8 It's a question I regard as, for one, easily postponed because
9 it really doesn't arise until post-verdict. And post-verdict,
10 we'll know a lot more about the actual case. But anybody who
11 has questions or suggestions they want to make, that's why
12 we're here.

13 MR. GLENNON: Your Honor, Edward Glennon with the
14 Federal Trade Commission.

15 I want to ask you, you said the first section of the
16 trial, phase of the trial would involve the state court claims,
17 which we agree with that. To clarify, our position is that the
18 Federal Trade Commission, we would argue that we would be able
19 to participate in that phase of the trial.

20 THE COURT: You would do what?

21 MR. GLENNON: Would we be able to participate in that
22 phase of the trial since the Court would be bound with regard
23 to our claims by the jury's findings?

24 THE COURT: Yes. Does anybody think they should not
25 be allowed to participate in the actual trial of the case, the

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1 examination of witnesses? That's what you're asking?

2 MR. GLENNON: Correct. Also in terms of opening
3 statement, closing argument as well.

4 THE COURT: That, I would regard as a separate
5 question. A lot of argument about something that they're not
6 going to be allowed to decide has some drawbacks. But I'd like
7 to hear, or I'd like to let you talk among yourselves about
8 what your preference is. What interests are involved in the
9 answer to that question?

10 MR. CASTELLO: Geoffrey Castello. I represent the
11 corporate defendants.

12 If we're talking in terms of the FTC addressing the
13 jury --

14 THE COURT: You'll be defending the case against the
15 same fact, really, but under the name of the New York State
16 statute.

17 MR. CASTELLO: Correct. Right. I think the only --

18 THE COURT: It seems to me you're going to be doing
19 exactly what you would want to be doing if you were trying one
20 or both or either of the two cases in any sequence.

21 MR. CASTELLO: I agree with that. The difference that
22 the parties have, the difference that the FTC and the
23 defendants have relates to opening and closing statements.

24 THE COURT: Yeah.

25 MR. de LEEUW: It's our position --

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1 THE COURT: And what is your position on that?

2 MR. CASTELLO: Our position is that under the FTC Act,
3 under FTC law, the FTC does not have a right to a jury. That
4 was invoked because of the claims raised by the NYAG. So I
5 don't think we have a disagreement that the FTC would
6 participate in a conduct of the trial in terms of examining
7 witnesses and presenting evidence or attempting to present
8 evidence. The difference comes, I think, strictly in the realm
9 of opening and closing statements, which they can do outside of
10 the jury's hearing but still make those arguments to you.

11 THE COURT: But you don't want them to be able to,
12 that's your position?

13 MR. CASTELLO: Yes, your Honor. That they should not
14 be permitted to open or close in front of a jury.

15 THE COURT: And why do you think that is better?

16 MR. CASTELLO: I don't know if it's better or not.
17 It's a matter of whether or not the law would entitle the FTC
18 to present opening and closing statements to the jury. That
19 would be unprecedented. There are some differences in the
20 two -- or the various statutes, state and federal, at issue
21 here. I don't want to suggest how that should be navigated by
22 plaintiffs. But it is our position that because they are not
23 entitled to present in front of a jury, if it were strictly a
24 claim brought by the FTC only under the FTC Act, this would be
25 a bench trial.

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1 THE COURT: Well, the person that would have to be
2 directed to the interesting point in that situation, which is
3 that their findings with respect to the state statute, the
4 factual findings, are later going to be binding on me as they
5 effect the nonjury points. So it's not a simple as it looks at
6 first.

7 MR. CASTELLO: It never is, your Honor. I agree. I
8 understand. But that is our position. And, your Honor, I
9 should say, I represent the corporate defendants. Ms. Wise and
10 Mr. De Leeuw represent Underwood individually. And I think
11 Mr. De Leeuw might have something he might want to say, or I'm
12 happy to entertain more questions.

13 MR. de LEEUW: I think you laid out our position very
14 well. They can participate in the trial, cross-examine
15 witnesses, examine witnesses, but they shouldn't be presenting
16 in front of a jury. And the one thought is that it could
17 confuse the jury to have the FTC addressing them as the FTC at
18 the outset. It could also potentially prejudice the jury to
19 think that both the federal government and the New York
20 Attorney General are trying the case against the company. So
21 we think there's reason the FTC should not participate in
22 opening and closing arguments.

23 MS. MATUSCHAK: Your Honor, may I --

24 THE COURT: Is the better time for you to make your
25 opening statements when we get to the FTC case and the nonjury

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1 trial?

2 MR. GLENNON: Well, your Honor, the FTC's position is
3 that I think it is a question of basic fairness, as you had
4 referenced earlier, since the Court will be bound with regard
5 to the FTC's claims. Then with regard to the jury findings for
6 the FTC claims, we think we should have a right to argue to the
7 jury. We think the Court could handle any issue of confusion
8 by explaining our position to the jury, if necessary, if the
9 Court thought it was necessary.

10 But basically, we think it is a matter of fairness
11 since we will be bound -- our claims will be determined by the
12 jury's findings, then we should have a right to not only
13 examine witnesses, but present opening statements and closing
14 argument.

15 THE COURT: And present evidence?

16 MR. GLENNON: Correct.

17 MS. MATUSCHAK: Your Honor, I'm Kate Matuschak.

18 THE COURT: I had my doubts.

19 MS. MATUSCHAK: I'm with the New York
20 Attorney General, and I just wanted to say that we are in
21 agreement with the FTC, that they should have a seat at the
22 table because they are going to be bound by what the jury ends
23 up with on the NYAG claims, and this has been an FTC and
24 New York Attorney General case from the beginning.

25 THE COURT: Who are you representing?

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1 MS. MATUSCHAK: I'm with the New York
2 Attorney General's Office.

3 THE COURT: Oh, okay.

4 MS. MATUSCHAK: Yes. And so our statutes are very
5 similar. They have common facts. These facts are going to be
6 presented to the jury first, and the Court is going to be bound
7 by what the jury comes up with. So we think as a matter of
8 fairness that the FTC should have a full seat at the table.
9 When the facts are being presented to the fact-finder, that's
10 going to end up binding both the AG and the FTC.

11 MR. GLENNON: And your Honor, if the Court is
12 concerned, we could discuss with defendants or discuss with you
13 an allotment of time so that if you were concerned about the
14 plaintiffs having two bites of the apple, perhaps we can
15 apportion time in some way so that that wouldn't be the case.
16 So we would have the plaintiffs as a whole, two plaintiffs
17 together, perhaps could have an equal amount of time to
18 defendants in making those statements and arguments.

19 THE COURT: It seems to me that the time for the FTC
20 case is after the AG's case. It's a question of how you regard
21 it. If you regard it as foreclosed, because the jury's verdict
22 will be binding, then that argues for some degree of
23 presentation to the jury in the AG's case. On the other hand,
24 a more healthy way of regarding it may be to say, look, it's a
25 separate trial, and there's a different basis, and the time for

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1 you to present your evidence, which would be different from
2 something that would otherwise be the only evidence before the
3 jury, and make your case then on its merits with the arguments
4 and the evidence that pertains to that. And that's really the
5 sound way to go, than to try to shoehorn a different purpose
6 into the decision of the jury in the jury case.

7 Again, these are intriguing questions, and the thing
8 to do is clarify, and my mind is now open – it is not closed,
9 it's open – and there's some advantage in keeping it empty
10 because these are things that ought to be considered carefully.

11 MR. GLENNON: If I could --

12 THE COURT: But my bias would be towards regarding
13 them as two separate trials – one of which has some limitations
14 imposed by the findings, factual findings by the jury in the
15 first case.

16 MR. GLENNON: Your Honor, I would say I think the
17 scenario is close -- the first one you described. I think the
18 jury's findings with regard to the state claims would be
19 conclusive with regard to the FTC claims. So I don't think
20 there would be a need to have a separate trial, a second trial
21 with additional evidence. I think it would be exactly the same
22 evidence, so I think it should be considered more as one trial.
23 And the jury's findings with regard to the state claims would
24 determine liability.

25 At least with regard to the corporate defendants in

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1 the second stage, those findings would also be binding against
2 the individual defendant, but the FTC would have to approve
3 additional elements against the individual defendant. So
4 those, we could address those issues separately and at a second
5 hearing or second stage of the trial involving the individual
6 defendant, but we do think that the overlap between claims
7 against the corporate defendants, against the state, those
8 would cover the FTC claims entirely. So it would be the same
9 evidence for the state claims and the FTC claims.

10 So we don't think it's necessary to consider them two
11 wholly different trials. It would be the same evidence, same
12 argument. So that's why we think we would be bound, or the
13 Court would be bound with regard to the FTC's claims by the
14 jury's finding. We think the FTC should get a seat at the
15 table and be able to argue, present opening statements and
16 closing arguments.

17 THE COURT: What are you going to say to them that
18 would make their judgment different from what it would be from
19 them just listening to the state?

20 MR. GLENNON: Well, your Honor, we would talk to the
21 state about how to divide up the issues. As Ms. Matuschak did
22 say, the FTC has been involved. This has been an FTC case. We
23 have done a lot of the work during the case, so we would want
24 to combine our efforts to make the opening statements, to make
25 our best arguments to the jury.

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1 THE COURT: And what's the answer to my question?

2 MR. GLENNON: Well, of course the skill of the federal
3 attorneys, of course, would be very helpful, without a doubt.
4 That would be to supplement the skill of the New York
5 attorneys, of course.

6 THE COURT: So you would be saying the same things to
7 them, except saying it better?

8 MR. GLENNON: Well, we'd try not to say the same
9 things. We are cognizant of the argument of unfairness about
10 not having two bites of the apple, so we're happy to divide the
11 issues in making any opening statements and/or closing
12 arguments. But we would want a seat at the table, having
13 prosecuted the case throughout. And since we will be bound, we
14 do want to have a say. We want the jury to hear what we, the
15 FTC, has to say and how we present the issues.

16 THE COURT: What do the defendants think about that?

17 MR. de LEEUW: Our view is the exact opposite. We
18 represent Mr. Underwood, and the New York Attorney General does
19 not have a claim against Mr. Underwood, only the FTC does.
20 We're concerned if the FTC is in front of the jury discussing
21 its full case, that is going to be a potential problem for us.
22 We're going to be bound by also whatever happens in front of
23 the jury, as your Honor will be.

24 THE COURT: You say discussed its full case?

25 MR. de LEEUW: So if it discusses it in any way.

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1 THE COURT: So they say they'd like to add some things
2 to the evidence that would be useful for them.

3 MR. de LEEUW: Well, we just think the dividing line
4 is going to be difficult. We represent an individual, but he's
5 also a principal at the company. It's going to be difficult.
6 And a lot easier way to do it is to do what your Honor
7 suggested, is essentially two trials, a separate trial for the
8 FTC claims afterward.

9 I know that my friend has suggested that they can
10 divide it up and leave all of the individual parts about
11 Mr. Underwood until afterwards, but I just see that as being
12 very difficult. And I think, again, we're willing to let the
13 FTC participate in examining witnesses and cross-examining
14 them. We don't think they should be addressing the jury in the
15 opening and closing remarks. We think that's where the
16 confusion can be created.

17 MR. GLENNON: If I could clarify our position, the
18 FTC's position. We would not argue the issues involving only
19 Underwood's individual liability to the jury. We would leave
20 those to the second stage in the elements of our case, only
21 against the individual defendant. We would leave those to a
22 second hearing only before the Court.

23 So in making our opening statements and closing
24 argument to the jury, we would not be addressing those elements
25 that pertain only to Mr. Underwood. We would not want to

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1 confuse the jury in that way.

2 MR. CASTELLO: Your Honor, may I add something that I
3 think is being lost here? These two agencies partnered
4 together. They made a decision. They could have brought their
5 actions separately. They partnered together. And when they
6 did that, they had to understand that there are two bodies of
7 law: One of which permits a jury trial, and one doesn't. And
8 I think a practical problem could come at closing when the jury
9 will hear charges relating to the NYAG's claims only; and yet,
10 the FTC wants to close.

11 And this isn't a matter of fairness, as I see it.
12 This is a matter of law. The FTC does not have a right to a
13 jury trial when it brings an action, an enforcement under the
14 FTC Act. So the only reason why we're having this conversation
15 -- your Honor has to decide the issue -- is because they decided
16 to partner together.

17 Your Honor's initial reaction to how to conduct the
18 trial is sound. They chose to bring these two separate actions
19 together, then let's do a staged trial, and they still have
20 not -- the FTC still has an opportunity to participate when it
21 comes to examining witnesses and presenting or attempting to
22 present evidence.

23 THE COURT: I listened to these are very intelligent
24 arguments. I have a growing fear that to the degree that the
25 FTC improves its case by the contributions it makes in the AG's

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1 case, it is corrupting the simple trial of the AG's case. And
2 it's entirely innocent, but that is the purpose of addressing
3 them, opening, and closing. Whatever evidence is put in, it's
4 put in to benefit the plaintiffs in the FTC case in a way that
5 they would not otherwise have. And, by definition, I think
6 that is a corruption of the separation that goes to the
7 separation between the jury trial and the nonjury trial. So
8 I'm concerned about whether that is the right path.

9 MR. GLENNON: I understand, your Honor. And I agree,
10 this is a very unusual posture for the case. The FTC,
11 typically – in cases which I have been involved, at least – has
12 only its claims, so a jury is not involved. This is an unusual
13 posture in that we, the FTC, would be affected by the jury's
14 findings. So that is the reason for the difference in this
15 case.

16 And, again, from our point of view, it does
17 essentially come down to fairness since we will be bound and
18 affected by the jury's finding. We feel we should have a seat
19 and be able to participate fully.

20 MR. CASTELLO: Your Honor, I think that states well my
21 view that this is a matter of law, not a matter of fairness.

22 MR. de LEEUW: And just representing Mr. Underwood, we
23 would not expect to be allowed to participate in the opening
24 and closing arguments in the New York Attorney General case
25 because we're not a party to that case. And so our expectation

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1 is that we shouldn't be doing an opening or closing to the
2 jury. We can participate to the same extent the FTC can, but
3 we think it runs both ways. But we are not arguing that we
4 should be allowed to present in front of the jury opening or
5 closing arguments in a case to which we are not a party.

6 MR. GLENNON: Your Honor, the FTC would not object to
7 Mr. Underwood's participation or presentation of opening
8 statements or closing argument with the understanding that they
9 wouldn't address issues that the jury didn't have to decide.
10 But we would not oppose Mr. Underwood's participation of the
11 same extent as the FTC because he would be bound and affected
12 by the jury's findings as well.

13 THE COURT: I think for present purposes, we should
14 regard the two trials as completely separate, and the FTC is
15 not to participate in the nonjury trial.

16 MR. GLENNON: Would we be able to examine witnesses in
17 the jury trial, your Honor?

18 THE COURT: Would you consider that participating?

19 MR. GLENNON: I would, your Honor. Defendants don't
20 have a problem --

21 THE COURT: Would anybody not consider it
22 participating?

23 MR. GLENNON: Yes. I note the defendants don't have
24 an objection to the FTC participating to that extent in the
25 first phase of the trial.

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1 THE COURT: My present inclination is to think that
2 you are really separate, and you will not be participating,
3 even to the small extent of examining witnesses. Now, that
4 might be subject to amendment. As we go along, there might be
5 some fluke corner to the case where it's a perfectly fair thing
6 to do. But I think the line we should be following is the
7 complete separation. And the jury's verdict will be nothing
8 but a proper jury's verdict on the germane evidence in that
9 case, not as embellished by other considerations that would
10 affect its judgment.

11 MR. GLENNON: Your Honor, just to fully state our
12 position, I would note that in a proceeding before the second
13 stage of a trial before the Court, there would not be any
14 additional evidence with regard to many of the factual claims,
15 like whether --

16 THE COURT: To many, you're saying?

17 MR. GLENNON: Correct. With regard to whether the
18 advertisements were made or whether they were false or
19 misleading, basically. The core issues with regard to the
20 corporate defendants, certainly there would not be any
21 additional evidence in the second stage of the trial. So all
22 the evidence under those issues would come out before the jury,
23 and we would be bound by the jury's findings. So I understand
24 the Court's position, again, given that there would be no
25 further evidence produced on those particular factual issues

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1 before the Court, the FTC would like to -- we believe we do
2 have a place, at least in the examination of witnesses and
3 presentation of evidence.

4 MS. MATUSCHAK: Your Honor, I'd like to add that the
5 government agencies chose to collaborate in this case because
6 our statutes are basically the same. There are some minor
7 nuances, but the fundamental issue in this case is were the
8 advertising claims made and were they substantiated. If they
9 were not substantiated, then they were deceptive, and they
10 therefore violate the FTC Act and the New York statutes at
11 issue in this case.

12 So there wouldn't be any difference in the
13 presentation by FTC lawyers versus the AG lawyers of our case
14 to the jury. We're all looking to establish the same facts,
15 and those same facts will meet the legal requirements of both
16 statutes at issue. So it's not as if Mr. Glennon, standing in
17 front of the jury, is going to present something different from
18 what someone from the AG's office will present.

19 We've been working as a team of co-plaintiffs in this
20 case. Given that we're government agencies doing law
21 enforcement with limited resources, we decided to pull together
22 to pursue what we perceive as a violator of both federal and
23 state law. So as a matter of fairness, we think that the FTC
24 should be with us at the table, and there won't be any
25 difference, your Honor, in terms of presentation.

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1 Ms. Azia is one of the attorneys from my office, and I
2 don't think her presentation to the jury in terms of examining
3 witnesses is going to be any different from what Mr. Glennon
4 will do, because we're establishing the same set of facts.

5 MR. GLENNON: And we have conducted discovery
6 together. So the FTC has deposed certain witnesses, the
7 New York Attorney General's Office has deposed certain
8 witnesses. So we have handled discovery together. We've gone
9 through that phase, working with the New York
10 Attorney General's Office, and have developed the case with
11 them.

12 And I agree with what Ms. Matuschak just said. There
13 wouldn't be any difference in terms of interacting with the
14 witnesses at trial. So, again, we wouldn't be doing a second
15 examination of the same witnesses for two plaintiffs, it would
16 just be one.

17 MR. CASTELLO: Your Honor, I see a big difference
18 between two bodies of law that plaintiffs bring their actions
19 under – that is that one allows a jury trial and one doesn't.
20 That's the issue we're discussing now. Whether or not the
21 claims relating to the merits of either one of their individual
22 statutes are similar or not is not the point for purposes of
23 this discussion.

24 The corporate defendants should not face a very
25 important aspect of the trial – opening and especially closing

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1 statements — where an agency that does not have a right to a
2 jury trial, because of their choice to partner together in this
3 case, now will be addressing the jury. So, again, I don't
4 think it's a matter of fairness in that sense. It's more a
5 matter of the law that tells us whether or not a jury trial is
6 permitted.

7 MR. de LEEUW: Also, they just argued that the
8 presentations wouldn't be different. Whether that's true or
9 not, they said that, and if that's true, doesn't that that
10 auger toward keeping the trial separate? If it's not going to
11 be different, then why risk the bleeding of one case over into
12 another as well?

13 MR. GLENNON: Certainly, with regard to examination of
14 witnesses and presentation of evidence, I don't think there's a
15 danger, your Honor, of the FTC corrupting the process or
16 inserting any additional argument at all improperly -- at all
17 that would affect the jury.

18 THE COURT: Well, I think the law gives you a nonjury
19 trial. And even if that's, to some extent or a great extent,
20 limited by considerations of what happened in the jury trial,
21 you still get the nonjury trial, and you can't sneak into the
22 jury trial and affect it in a way that would lead to your
23 advantage in a nonjury trial. They are separate. And I think
24 the simplest way to try the jury trial is always the best, and
25 the best way is to try it as the jury trial. And without

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1 bringing in nonjury matters, such as an opening, closing by
2 people who are only entitled to a nonjury --

3 MR. GLENNON: What the --

4 THE COURT: -- that leads to a blurring. And the
5 Court does its best to avoid blurring.

6 MR. GLENNON: Your Honor, I understand with regard to
7 opening statements and closing argument. Again, would the FTC
8 then be allowed to participate to the extent of examining
9 witnesses that would not involve argument?

10 THE COURT: I was a lawyer for 30 years. I tried a
11 lot of cases. And I always felt that when I was examining the
12 witness, I was taking part in the case. If something has
13 happened to change that -- my time examining witnesses was a
14 great deal of the case, and the rest was argument or opening
15 statements, things like that. So I think the answer is,
16 unfortunately, no.

17 MR. GLENNON: Could we have the opportunity to perhaps
18 brief the issue, your Honor?

19 THE COURT: Yes, you may. And the only way that I
20 would base it, as presently thinking, that I would be very
21 interested in what you have to say is if it first made clear
22 what the difference to the jury, having your presentation in
23 the middle of the jury case, as compared to not having it. The
24 risk is one of distortion, and the more the distortion benefits
25 the person not entitled to a jury trial, the less just it is.

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1 MS. MATUSCHAK: Your Honor --

2 THE COURT: These are of course preliminary views, but
3 it's good to air them when we have time to think about them.

4 MS. MATUSCHAK: Thank you, your Honor. I just wanted
5 to seek a bit of clarification in terms of the risk of
6 distortion. I wonder if you can give us a little more guidance
7 as to when it's just a strict Q and A and presentation of
8 evidence, what the distortion risk is there based on who the
9 attorney is.

10 THE COURT: You're dragging a jury case into a
11 situation which it is not entitled to. That's the distortion,
12 to start with.

13 Should we be moving along?

14 MR. de LEEUW: Yes.

15 THE COURT: Mr. Underwood. What of the Underwood
16 participation should we address now?

17 MR. de LEEUW: Well, we think that your Honor is right
18 in your preliminary view on the FTC, and we think we would not
19 have the ability to participate in the trial when we're not a
20 party.

21 THE COURT: Yes.

22 MR. de LEEUW: So we agree with your Honor.

23 THE COURT: Yes, I think the consequence of the jury's
24 findings being binding, they are binding as far as they go and
25 as far as they express the evidence that's before them. They

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1 can't be expanded much beyond that. And it's an advantage of
2 keeping separate things separate.

3 Oh, next question. Maybe I'm jumping ahead. If I am,
4 it's simply out of a sense of what I should eat, thinking about
5 lunch.

6 The calling and recalling of witnesses by the two
7 sides, we do it all the time, and as much as is practical in
8 every case. There's no problem with it. He is first called as
9 a hostile witness, and then he testifies as a friendly witness,
10 and then he has a reply. But the jury understands and
11 everybody understands it's not a difficulty.

12 Trial lengths and trial days. My own lawyer here, who
13 is very hard-driving, thinks that those are sort of languid
14 dates. I think they're pretty reasonable, so I don't think
15 you'll have a fight over that.

16 Motions *in limine*, I think the process is under
17 control. Don't be surprised if all or a large portion are
18 reserved until trial. It's in their nature. And the avoidance
19 of -- well, let me put it the other order. The benefit of
20 reserving that kind of question until trial is that then it's
21 resolved in view of all of the proceedings that have happened
22 up until that point and all of the things that have been said
23 up until that point.

24 And any judge who has been on the bench as long as I
25 have has had the rather discouraging experience of having, for

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1 sound intellectual reasons, excluded evidence in advance, and
2 who finds in the middle of trial the whole bases for that
3 determination is no longer a fact, and now the ends of justice
4 require that you are to get that evidence back and have it
5 heard. And that, of course, from some sense, is the advantage
6 of the motion *in limine*. But it's a disadvantage also.

7 And the common experience is that the motion *in*
8 *limine*, which is reserved until trial decided then, that
9 presents a lot fewer problems than it does in the material
10 submitted with the motion *in limine*. A lot of them go away,
11 including some of the experts. But they certainly don't
12 reoccur at trial. So there are powerful motors towards
13 treating them that way. And it really takes an exceptional
14 case that says that this one -- they really ought to know is
15 getting in or is not, or this would really be a waste of time,
16 something like that.

17 MS. MATUSCHAK: Your Honor, could I just, on that one
18 point, in terms of Daubert, there are a number of witnesses
19 that the Court has just cited to reserve judgment on, and it
20 could fundamentally change the length and content of the trial.
21 And so the parties --

22 THE COURT: That's for the good, because that's when
23 they should be heard.

24 MS. MATUSCHAK: Understood. Yes. The parties had
25 inserted into a letter just a question for the Court --

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1 THE COURT: We're not trying to shorten the trial by
2 deciding the questions one by one first. It's not a good
3 procedure. The best procedure is trying it.

4 MR. GLENNON: Your Honor, with regard to the motions
5 *in limine*, we did want to see what procedure you'd like the
6 parties to follow in terms of filing those. Should we file a
7 letter requesting a pre-motion conference?

8 THE COURT: No, no. No pre-motion.

9 MR. GLENNON: Okay.

10 THE COURT: Just the barebones of the motion *in*
11 *limine*.

12 MR. GLENNON: Thank you, your Honor.

13 THE COURT: And the Daubert reasons. And like
14 anything else, the clearer the statements are, the more
15 effective they are.

16 Is there anything else that we should be doing today?

17 MR. de LEEUW: Trial date, a date for trial.

18 THE COURT: A date for trial seems to be shaping up
19 for January.

20 Mike, the latter half?

21 DEPUTY CLERK: I think you had thought about
22 February 6.

23 THE COURT: February 6. These things are still, to
24 some degree, in the hands of the committee that was forced on
25 us by COVID, but they are getting more and more back to the old

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1 system where you can claim a date with a pretty fair chance of
2 getting it. I'd look at a date in that line.

3 MR. de LEEUW: Okay.

4 THE COURT: One of the Court's greatest specialists in
5 this field is Mike Lee.

6 MR. de LEEUW: Absolutely.

7 THE COURT: He knows all about it.

8 MR. GLENNON: Your Honor, a question about the second
9 stage involving Mr. Underwood, his individual liability.

10 THE COURT: Yes.

11 MR. GLENNON: Would the Court envision a hearing on
12 that to follow immediately after the jury proceedings?

13 THE COURT: Yes. No. We're going to know so much
14 more about this, what the issues are, at that point and how
15 much time we have and when we would like to schedule. But to
16 try to do it now is just fooling yourself. It will come along
17 in due course.

18 MR. GLENNON: Okay.

19 THE COURT: But basically if it were necessary to be
20 addressed to Mr. Underwood, it can be regarded as postponed
21 until after the trial because you will have a sure sense of
22 what it involves.

23 MR. GLENNON: I understand, your Honor. Thank you.

24 THE COURT: Thank you, all. Have a good weekend.

25 (Adjourned)